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May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: November 3, 2004
Case No.: TIA-0303

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a secretary at the DOE's Savannah River site (site) for approximately two years, from 1992 to 1994.

The Applicant filed an application with the OWA, requesting physician panel review of several illnesses: peptic ulcer disease, lung problems, hearing loss, and white blood cells in urine. The Applicant claimed that these illnesses were the result of being exposed to toxic substances during her work at the site.

The Physician Panel rendered a negative determination with regard to each of the claimed illnesses. The Panel agreed that the Applicant had these illnesses, but concluded that it was unlikely that they were related to toxic exposure at the DOE site. The Panel stated that the Applicant's total

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g)

exposure to ionizing radiation was "far below" the acceptable limits and that there was no information in the record indicating overexposure to toxic chemicals.⁴ One member of the Panel stated that since the Applicant's hearing loss was only in her right ear, it was likely attributable to impact on that side, firearm use, or other organic causes, rather than occupational exposures.⁵

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant asserts that (i) she claimed gallbladder disease, rather than peptic ulcer disease, (ii) her respiratory problems post-date her employment at the site, (iii) her hearing loss was not caused by firearm use, and (iv) she has new medical information to be considered.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Panel did not error in its consideration of the peptic ulcer disease, rather than gallbladder disease. The Applicant's original application lists peptic ulcer disease as a claimed illness.⁶ Although the record contains information about the Applicant's gallbladder disease, the Applicant did not claim that illness. Accordingly, the Panel was not required to consider it.

The Applicant's argument that she did not have these illnesses prior to her employment at the site does not demonstrate Panel error. The Panel considered the specific occupational exposures and medical records of the Applicant with respect to the claimed illnesses. The Panel applied

⁴ Physicians Panel Report, addendum of second reviewer.

⁵ See Physician Panel Report at 3.

⁶ See Record at 1.

the "at least as likely as not" standard required by the Rule and determined that the claimed illnesses were not related to workplace exposures. The Applicant's argument that she did not have the claimed illnesses before working at the site ignores the possibility that other factors may have caused, contributed to, or aggravated the illnesses. Accordingly, the Applicant's appeal merely expresses disagreement with the Panel's medical judgment and does not indicate Panel error.

The Applicant's disagreement with the Panel's suggestion that her hearing loss could have been caused by firearm use also does not indicate Panel error. The Panel specifically considered the Applicant's potential toxic exposures. The Panel stated that the Applicant's job description "indicates that she would not have had any significant exposure to ionizing radiation or toxic substances" during her employment at the site.⁷ It also stated that hearing loss related to high-level solvent exposure is "nearly always bilateral and relatively symmetrical."⁸ Accordingly, the Panel concluded that the Applicant's right-sided hearing loss was not related to workplace exposures. The Panelist's speculation about the cause of the hearing loss was not necessary to that analysis.

Finally, the existence of additional medical records does not demonstrate Panel error. The Panel bases its determination on the information contained in the record. If the Applicant believes that additional materials support her application, she should raise the matter with the DOL.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0303 be, and hereby is, denied.

⁷ Physicians Panel Report, addendum of second reviewer.

⁸ *Id.*

(2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 24, 2005